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No. 14-144

In The
Supreme Court of the United States

JOHN WALKER III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, ET AL.,

Petitioners,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND THE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS[1]

The American Center for Law and Justice ("ACLJ") is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or for amici, *e.g.*, *FCC v. Fox TV*, 132 S. Ct. 2307 (2012); *USAID v. AOSI*, 133 S. Ct. 2321 (2013). ACLJ attorneys regularly litigate in the area of free speech, including the scope of government speech. *E.g.*, *Pleasant Grove; Lamb's Chapel*.

As an association of Christian attorneys, law students, and law professors, the Christian Legal Society ("CLS") believes that pluralism, which is essential to a free society, prospers only when the First Amendment rights of all Americans are protected, regardless of the current popularity of their beliefs, speech, and assembly. For four decades, through its Center for Law and Religious Freedom, CLS has defended citizens' rights to express their religious ideas and beliefs in the public square, through advocacy in this Court and through legislation. For example, CLS was instrumental in the passage of the

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[1]The parties in this case have consented to the filing of this amicus brief. Blanket letters of consent are on file with the Court. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Equal Access Act of 1984, which protects the right of all students to meet for "religious, political, philosophical or other" speech on public secondary school campuses. 20 U.S.C. §§ 4071-4074 (2012). *See* 128 Cong. Rec. 11784-85 (1982) (Sen. Hatfield statement). CLS categorically rejects the racism many view as represented by the flag at issue in this case. But the Confederate battle flag has done enough damage in American history and should not be allowed to work further injury by damaging the First Amendment. The flag is understandably seen by many individuals as a racist symbol, but that alone does not justify distorting free speech doctrine in order to suppress it. The First Amendment's bedrock principle must remain that the State may not deny access to a forum open to other speakers because the State disapproves of the speaker's message.

SUMMARY OF ARGUMENT

This amicus brief makes two main points: (1) proper application of the government vs. private speech doctrine must analyze the particular components of the activity, rather than attempt to slap a single label over the entire enterprise, and (2) exclusion of a particular symbol because of the offensiveness of what it stands for is classic viewpoint discrimination.

1. Identifying speech as governmental or private can be obvious, but in some cases drawing the distinction can seem daunting. When a particular instance of expression emerges from a mix of both government and private input – e.g., specialty or vanity license plates, or guest speaker or student expression at a public school event – proper analysis

requires the Court *to analyze separately the component parts* of the activity in question, rather than attempt to attach a blanket label to the entire activity. Such an analysis, applied to this case, shows that the content of SCV's proposed specialty license plate is the constitutionally protected *private* speech of the SCV, not the speech of the state. Hence, the government speech doctrine does not preclude First Amendment scrutiny.

2. Viewpoint discrimination is generally the worst form of censorship in under the First Amendment. Censorship of a particular symbol, for the express reason that the symbol represents, in the eyes of some observers, *ideas* that are offensive, is viewpoint discrimination even if the state has not condoned or approved the opposite message.

ARGUMENT

The speech to which petitioners object is the private, constitutionally protected speech of entities invited to put their messages on specialty plates, not the government speech of the state. Moreover, the exclusion of the proposed plate design, expressly because some people found a symbol on that plate offensive for what that symbol stands for, is classic viewpoint discrimination.

I. THE SPEECH TO WHICH RESPONDENTS OBJECT IS PRIVATE SPEECH, NOT GOVERNMENT SPEECH.

A private entity's proposed message-bearing specialty plate design is private speech. Where the government by policy and practice routinely approves such proposals, the selective denial of such a proposal triggers First Amendment scrutiny. The fundamental problem with the approach Texas proposes is that it seeks, not simply to *justify* the state's rejection of certain private speech, but to categorically *deny any First Amendment analysis* of a restriction on that speech, by labeling the speech as "government speech."

A. The Distinction Between Government Speech and Private Speech is Crucial.

"The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009). Hence, the classification of speech as "government" or "private" can be, and often is, decisive of a First Amendment claim. It is vital, therefore, that the distinction between the two categories be drawn correctly.

When, as in this case, the speech at issue occurs in the context of a mix of private and government action, proper constitutional analysis *must* focus upon the particular, specific components of the activity or program at issue in order to avoid erroneously lumping both government and private speech under one, ill-fitting, blanket label. *Infra* § I(C).

B. This Court Should Reject the Tests Texas Proposes.

The tests Texas suggests for drawing the distinction between government and private speech are wrong, or at least incomplete.

First, Texas proposes that speech is "government speech" if it takes place "within the scope of [a] government program." Pet. Br. at 13. This is plainly wrong. The private speakers in this Court's "equal access" cases spoke within the scope of some facilities use program (as in *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lambs Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001)) or educational program (as in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995)). The private entities seeking contributions from government employees (*Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985)) or access to teachers (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)) spoke within the scope of government programs (the Combined Federal Campaign and the school's internal mail system, respectively). All communications to and from prisoners take place within the scope of state penal programs. *Thornburgh v. Abbott*, 490 U.S. 401 (1989). Yet in none of these cases did this Court apply the government speech doctrine, which would have left the restricted speech devoid of First Amendment protection.

If Texas were correct that all speech "within the scope of a government program" is government speech, then whenever a government entity hosted a panel discussion on a topic or invited speakers to a college graduation, the government would possess complete

censorship power over the private speakers. And if Texas tries to salvage its argument by contending that the "scope of the program" includes only the government's own speech, not that of private speakers, then this "test" becomes circular and thus useless as a means of identifying government speech.

Second, Texas contends that speech becomes government speech whenever the government may feel the need to disassociate itself from the message. Pet. Br. at 13. But this also is not right. Third-party speech on the grounds of a shopping mall did not become the speech of the mall owners just because the owners might have objected to being associated with the message. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-88 (1980). And the desire of a public school or university to distance itself, for anti-establishment purposes, from the religious message of private users, as in *Widmar*, *Lambs Chapel*, *Good News Club*, etc., did not morph the private speech into government speech. Merely *allowing* private speech does not convert it into government speech: "The proposition that [government bodies] do not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality). The government's desire to disassociate itself from a private message goes to the asserted *justification* for the restriction on private speech, not the nature of the speech itself.

The third test Texas offers – whether the government "effectively controls" and "exercises final approval authority" over the message, Pet. Br. at 14 – is closer to the target. However, this test runs the risk of being question-begging. Anytime the government censors a message, the government can, in self-justifying fashion, say that its very assertion of

censorship power itself demonstrates that the government controls and approves (or disapproves) the message, rendering it government speech outside the scope of First Amendment protection. But this cannot be true, as it would largely nullify the Free Speech Clause and would require overruling a long list of First Amendment cases, from *Cantwell v. Connecticut*, 310 U.S. 296 (1940), to *Snyder v. Phelps*, 562 U.S. 443 (2011), to everything in between. Nor could Texas rescue its circular approach by limiting it to speech that the government hosts or subsidizes. Such a rule would still require the overturning of, or dismissing as analytically obsolete, a long list of precedents, encompassing not just the equal access cases but also public broadcasting (*FCC v. League of Women Voters*, 468 U.S. 364 (1984)), permit programs (*Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992)), government aid programs (*Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001); *USAID v. AOSI*, 133 S. Ct. 2321 (2013); *NEA v. Finley*, 524 U.S. 569 (1998)), and speech on government-controlled premises (*Lee v. ISKCON*, 505 U.S. 830 (1992) (per curiam) (airport terminal); *Cornelius* (government work space); *United States v. Kokinda*, 497 U.S. 720 (1990) (post office grounds); *Cincinnati v. Discovery Network*, 507 U.S. 410 (1993) (public rights of way); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (utility poles); *United States v. Grace*, 461 U.S. 171 (1983) (grounds of Supreme Court); *City of Madison Joint Sch. Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976) (board of education meetings); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (public school premises); *Flower v. United States*, 407 U.S. 197 (1972) (military

base)). In all such cases, First Amendment scrutiny applied, regardless of which side ultimately prevailed. The notion that speech in such contexts *ipso facto* becomes government speech, just because the government claims the right to control it, is analytically and precedentially indefensible.

C. To Draw the Line between Government Speech and Private Speech, a Court Must Analyze the Component Parts Separately.

Proper analysis of whether speech is government or private in nature requires a court to look, not at the activity or program as a whole, but rather at the particular aspect at issue.

"There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech," *Pleasant Grove*, 555 U.S. at 470. Cases involving "mixed speech" of government and private parties seem particularly to have flummoxed the lower courts, leading them to compose cumbersome multi-pronged tests in a vain attempt to find the perfect formula for labeling the speech in question. *See, e.g., Sons of Confederate Veterans v. Commissioner of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618-19 (4th Cir. 2002) (referring to four-factor test used in other circuits, but describing those factors as not necessarily "an exhaustive or always-applicable list"). The goal of such tests seems to be to figure out what blanket label to apply to the speech at issue. But this goal is itself misguided. There is no necessity to apply a blanket "government" or "private" label to the entirety of the interplay between governmental and private actors. A famous artist's speech does not become government

speech just because the artist delivers that address at the commencement exercises of a state school (even if the school requires assignment of intellectual property rights in the speech). The remarks of a business owner or environmental activist do not count as government speech just because they are invited participants in a government-sponsored panel discussion (even if the government conditions participation upon conferring intellectual property rights, e.g., to publication, to the government agency).[2] In all such cases, a court should *examine the component parts* to determine whether the particular content in question is government speech.

To illustrate this approach, consider a public school talent show. Is a student performer's rendition of the song, "Amazing Grace," private speech or government speech (the latter raising Establishment Clause questions)? The best answer to this question is not found by asking the question, "Whose speech is the talent show, the school's or the participants'?" Both are speakers, so any blanket label will not fully correspond to reality. Rather than collapsing together the school's involvement and the student's role, a court should therefore examine the constituent parts separately. Thus, the school is the one that chooses to have a talent show; that determines which student grade levels are eligible to participate; that sets the date, time, and length of the program; and that sets the parameters for performance genres (songs? skits? dance?). Each of these decisions is state action – and, if communicative, government speech – subject to whatever constitutional limits might apply. But what

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[2]The detail that Texas asserts ownership rights over specialty license plate designs is therefore not dispositive.

about the song itself? It depends. If the school picks the song, then yes, that content is government speech (though the student's manner or style of performing it is not). If the school provides a limited menu of song options (or identifies a theme), then the delineation of that list (or theme) is state action or government speech (though the student's voluntary selection within those parameters is a private choice). If the school leaves the choice entirely to the student (albeit subject to limitations on length, decency, defamatory content, and so forth), then the song selected is the student's speech, even though it is situated in the midst of a government program. Separate analysis of the particular components of the program or activity thus trains in upon the identity of the actor making the relevant content choice, rather than attempting to make a global judgment about the entire production.

Another example would be a state college graduation ceremony. The college decides to have the ceremony, when and where to do so, and whether to have an outside speaker. That is all state action (and, to the extent it is expressive, is government speech). If the college officials select a guest speaker (as opposed to letting students pick one, for example), that selection is also government speech. The college may limit the speaker as to length or topic (with the speaker free, of course, to decline the invitation). But when the guest speaker then chooses what words to say, that is private speech, not government speech. To ask, "Is a graduation ceremony government speech?" is therefore to ask the wrong question. Instead, the analysis must focus upon what *part* of the program the government seeks to restrict, and who – the government or a private party – is responsible for formulating that part.

D. Texas Objects to Private Speech.

Turning to the case at hand, analysis of the components of the Texas specialty plates program reveals that Texas is objecting to private speech, in particular to a specific symbol. The question is not whether "specialty plates" as a whole are private or government speech – both are involved – but rather whether the state's rejection of a proposed plate design is the rejection of private speech.

Specialty plates are not necessarily government speech or private speech. Much depends upon how the program is set up. If the legislature individually adopts each design on a case-by-case basis, as in North Carolina, *see Berger v. ACLU of North Carolina*, No. 14-35 (U.S. cert. petition pending), then every such specialty plate may be government speech, i.e., a message belonging to a limited list of menu options promulgated by the state itself. To be sure, an individual driver's choice to pay for and display a given plate is private action and private speech. But if one cannot expect that the state will routinely approve whatever message a private proponent desires, and it is clear that every individual message is promulgated by the government (even if proposed, like many bills, by private parties), then the specialty plate messages are government speech.

By contrast, where a state sets up a standing system whereby private persons or entities can propose their own designs willy-nilly, subject only to standards of visibility, distinctiveness, and reflectivity, Pet. App 57a, where no extraordinary government initiative (like legislation) is required, and where such proposals are, as a matter of practice, routinely approved, the state has essentially set up a forum for private speech.

In such circumstances the state cannot fairly be said to be uttering its own government speech. That the government might reserve a veto prerogative does not change the *nature of the speech*. For example, a school's reservation of a right to veto the meeting of any particular student club, or to censor the content of a guest speaker at a graduation ceremony, would not convert such student meeting or guest speaker's address into government speech. Otherwise the challenged censorship power would be self-justifying, not just under First Amendment analysis, but by taking the case out of the First Amendment altogether.

Here, Texas has installed both kinds of systems. The legislature's plate-by-plate approval of particular designs is government speech, while the plates routinely processed and approved by the DMV Board represent private speech. The difference is not the fact that in one system the legislature approves, while in the other an agency does. *Cf.* Pet. at 12 (attacking this distinction). Rather, the difference is the "policy and practice" of the government, *Cornelius*, 473 U.S. at 802, that evidences in this case, on the one hand (the legislative program), consummate government selectivity, and on the other (the agency program), an essentially open-door approach to private speakers. This is the same distinction between a government official who selects various decoration for the walls of an agency's offices (government speech), and a government official who opens the walls of the agency's lobby for rotating student art displays from local public and private schools (private speech).

Here, the composition of the particular proposed specialty plates was completely the work of the private speakers. *Compare Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005) (finding government speech

where the "message is from beginning to end the message established by the Government"). The content of the proposed plates was private speech, not government speech, and the Free Speech Clause analysis must proceed on that basis.

II. DISALLOWING PRIVATE SPEECH BECAUSE OF THE OFFENSIVENESS OF THE IDEAS FOR WHICH IT STANDS IS CLASSIC VIEWPOINT DISCRIMINATION.

Government prohibition of a symbol, on the basis that the ideas that symbol stands for might be offensive to some, is classic viewpoint discrimination.

Certainly the term "offensive" is broad enough to include communications that could be restricted in viewpoint-neutral fashion. For example, a state might seek to forbid profanity or crude language on specialty or vanity plates. (Whether that effort would be successful is a question for another day. *Compare Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986), *with Cohen v. California*, 403 U.S. 15 (1971).) A state might likewise desire to bar nudity or explicitly sexual depictions on specialty plates (*compare Sole v. Wyner*, 551 U.S. 74 (2007), *with Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)), or messages likely to invite a violent response (i.e., fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

But there is another meaning to "offensive" that strikes more directly at the heart of the First Amendment, namely, "objectionable because of the ideas it represents." Rejection of *ideas* because they occasion offense is the antithesis of free speech. "After all, much political and religious speech might be perceived as offensive to some." *Morse v. Frederick*, 551

U.S. 393, 409 (2007). Such offense-based censorship represents viewpoint discrimination, i.e., bias against certain ideological positions or perspectives.

The ban on the Confederate battle flag in this case is an example of the viewpoint-based use of "offensive." Leaving aside the debate whether the SCV or its critics (or both) have the correct reading of the meaning of that flag, it is undisputed here that the state's disallowance of SCV's proposed specialty plate represented a rejection of an offensive *idea* – racism – which that flag is understood by many to represent. That makes the exclusion *viewpoint-based*.[3]

Texas argues that the exclusion is not viewpoint-based where the state has not endorsed or approved a specialty plate with the opposite message, i.e., a condemnation of the Confederate battle flag. Pet. Br. at 15, 52. This is very mistaken. Rejection of a symbol which, as here, equates to rejection of the idea(s) for which it stands, suffices to show the rejection of a viewpoint. The government official who censors a meeting for its socialist perspective need not approve a meeting of capitalists before the viewpoint bias can be established. Just so, the state need never affirmatively approve disparagement of the Confederate battle flag before a court can conclude

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[3]The Fifth Circuit said that the state's disallowance of the SCV plate "discriminated against Texas SCV's view" about the Confederate battle flag and "implicitly dismissed that perspective." Pet. App. 18a. This cumbersome phrasing obscures the heart of the matter. The viewpoint discrimination consisted, not in the state's adoption of a contrary viewpoint – it is entitled to do so – but in its censorship of SCV's viewpoint. As the Fifth Circuit more aptly phrased it further on in its opinion, "it appears that the only reason the Board rejected the plate is the viewpoint it represents." Pet. App. 19a.

that the rejection of SCV's plate was viewpoint-based. The second shoe need never drop to prove that the first item dropped was, in fact, a shoe.

Texas objects to this conclusion by raising the prospect of specialty plates favoring terrorism, drunk driving, or child abuse, Pet. Br. at 10, but such law school hypotheticals are triply flawed. First, these suggestions are highly, highly unrealistic. As Texas concedes, *id.* at 36, drivers are already free to post the same distasteful hypothetical messages on bumper stickers, but they do not. It is hard to see why the prospect of a specialty plate would make someone more likely to go to the time, effort, and expense of that route to affix such unpalatable messages to one's car. Second, states are free, for budgetary reasons, to deny manufacture of a specialty plate until a minimum number of subscribers (enough to justify the expense of production) have pledged to purchase the plate. So even if an occasional crank were to propose a particularly noxious message, it is hard to believe there would be enough other people willing to commit their money (and reputations) to start the production line going.[4] And third, while Texas has focused on consensus examples of especially horrendous speech, there will be other cases where there is legitimate debate about whether a particular notion – favoring birth over abortion, or vice versa; supporting Israel or

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[4] It is normally unconstitutional to restrict an idea because of its unpopularity. However, a neutral, reasonable restriction that *incidentally* reduces the availability of one option for speaking is a different animal. *Cf. American Party of Texas v. White*, 415 U.S. 767, 782-83 (1974) (state can insist upon a "significant, measurable quantum of community support" as a condition of ballot access).

the Second Amendment or "going green," or vice versa – will be sufficiently offensive to some to warrant censorship. *Compare* Pet. Br. at 49 ("Everyone knows that statements or logos touching on matters of politics or race are likely to offend others").[5] Texas's emphasis on the worst cases does not justify empowering states to make judgment calls that are more likely to shade from censoring ideas that garner universal condemnation into censoring ideas that represent sides in hotly (or even mildly) contested debates.

* * *

This brief does not address the state's suggestion that the messages on state specialty plates should be analogized to *advertisements* subject to the state's editorial control. Pet. Br. at 26-27, 31, 37.[6] Nor does this brief address the question whether, in the specialty plate context, viewpoint discrimination may be *justified* against a symbol many people may find

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[5]Texas also argues that a veto based upon the reaction of the public is objective and viewpoint-neutral. Pet. Br. at 47-48. But an audience reaction that finds an idea or symbol offensive reflects the *subjective viewpoints* of those viewers. *See Forsyth County v. Nationalist Movement*, 505 U.S. at 134. Government enforcement of such private viewpoint-based objections to ideas runs afoul of the norm that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

[6]Importantly, in the advertising context the speech remains that of the *advertiser*. The NASCAR driver is essentially selling space on the driver's car or uniform, just like the New York Times sells space on its pages. It is the advertiser, not the newspaper, that sells clothing or touts housekeeping services. Hence, Texas is mistaken to see this analogy as an argument for a finding of government speech.

offensive for the ideas it represents – a Playboy bunny logo, a hammer and sickle, a Redskins logo.[7] Hence, this brief is filed in support of neither party.

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[7]Amicus does note, however, that "ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional," *Rosenberger*, 515 U.S. at 830 (internal quotation marks omitted).

CONCLUSION

This Court should clarify the proper analysis of the distinction between government and private speech as outlined above. In addition, this Court should reiterate that the rejection of a symbol, because of objection to the ideas the symbol is perceived to stand for, is viewpoint discrimination.

Respectfully submitted,

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